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National courts and European soft law: Is *Grimaldi* still good law?

Abstract *This Article discusses the Grimaldi obligation, that is, the duty of national courts to take European soft law into account when deciding cases. In view of the evidence from the longitudinal study of the Grimaldi jurisprudence, it is suggested that although the doctrine has not changed, the world around it has. While the ECJ has not reversed the precedent set by Grimaldi, nearly three decades of EU soft law making have eroded the foundations of the doctrine to the extent that the obligation has become heavily nuanced. First, to the extent that the soft law measure is issued by the EU institution and its development is foreseen in primary or secondary law, Member State courts can depart from the interpretation offered in the measure only if they can provide detailed and substantively valid reasons why it should not apply. Second, if the soft law instrument is free-standing, that is, is not derived from primary or secondary law, or where non-binding guidance is given by actors other than the institutions, the Member State court has more leeway to decide whether or not to take non-binding guidance into account. The third noteworthy feature that emerges from the analysed jurisprudence is that Member State courts have become more proactive in challenging EU soft law, and, insofar as it is an act of the EU institution, the Court is cautiously accepting validity challenges posed by Member State courts in the preliminary reference procedure. This suggests that if a new or revised Grimaldi is to be found, it should be through judicial dialogue.*

1. Introduction

In November 1989 when the European Court of Justice (ECJ) ruled on the occupational disease case sent to it by the Belgian Labour Court, the ECJ hardly thought it was handing down a landmark decision.¹ In *Grimaldi*, named after an Italian migrant worker, the ECJ held that national courts are bound to take non-binding Commission Recommendations into account when adjudicating disputes.² It is, of course, impossible to go back in time and establish what the judges were really thinking, but what we know is that the ECJ's decision in *Grimaldi* has never accrued any serious attention from EU lawyers. Also, as we will see below, the decision has been sparingly referenced in the ECJ jurisprudence. However, for any scholar who has ever ventured to research or write on EU soft law, the *Grimaldi* decision occupies a special place in the case law, and it is difficult to find a scholarly piece on soft law that does not make a reference to *Grimaldi*. Indeed, it constitutes a leading case in EU soft law scholarship.

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¹ For what constitutes a landmark decision in EU law, see Urska Sadl and Yannis Panagis, "What Is a Leading Case in EU Law? An Empirical Analysis", 40 *European Law Review* (2015), 15–34.

² Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles*, EU:C:1989:646.

Much has happened in the nearly three decades that have passed. Most importantly, the generation of soft law measures is reaching levels that were previously unimaginable and astounding, even from today's point of view. The Commission, EU agencies, and ad hoc administrative networks publish non-binding soft law guidance across a growing range of policy fields, ranging from detailed guidelines clarifying the application of state aid rules for the financial sector during the European debt crisis, to guidance explaining how to interpret the provisions of the Medicinal Products Directive, to technical guidance documents intended to assist stakeholders in the implementation of the Water Framework Directive. There is not only more of it, but it is more complex and its mastery requires more time, expertise, and knowledge than before. Perhaps most importantly, nearly everyone is now a potential soft lawmaker. The Commission is still the most prolific soft lawmaker, but in contrast to earlier decades it is increasingly in the habit of preparing soft law together with groups of experts from national authorities and professional associations from industry. EU agencies have also emerged as important actors in the EU's soft law scene, adopting soft law documents either alone or in collaboration with representative actors from industry and civil society.

Matching this tremendous growth in soft lawmaking has been a growth in the literature devoted to assessing its causes, consequences and prospects of review.³ The role and performance of the EU courts in controlling the adoption and use of soft law by the EU institutions has been discussed within this wider body of literature. Some view judicial intervention as a positive evolution, while others are more wary, ultimately viewing the courts' role as deferential, at most a backup. In this respect, it is striking that while one of the most famous cases concerning soft law addresses the duty of national courts to have regard to recommendations, little to no debate has been raised concerning EU soft law in national legal systems, including the Member State courts' use of EU soft law.⁴

³ Oana Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law, 2013), 162; Linda Senden, *Soft Law in the European Union* (Hart Publishing, 2004); Emilia Korkea-aho, *Adjudicating New Governance. Deliberative Democracy in the EU* (Routledge, 2015); Joanne Scott and Susan Sturm, "Courts as Catalysts: Re-Thinking the Judicial Role in New Governance", 13 *Columbia Journal of European Law* (2006), 565–594; Mark Dawson, "Transforming into What? New Governance in the EU and the Managerial Sensibility in Modern Law", 2 *Wisconsin Law Review* (2010), 389–440.

⁴ For exceptions, see Emilia Korkea-aho, "EU Soft Law in Domestic Legal Systems. Flexibility and Diversity Guaranteed?", 16 *Maastricht Journal of European and Comparative Law* (2009), 271–290; Zlatina Georgieva, "Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective", 16 *German Law Journal* (2015), 223–259; Andras Kovacs, Tihamer Toth and Anna Forgacs, "Effects of European Soft Law at National Administrative Courts" 14 *Loyola University Chicago International Law Review* (2016).

This Article is an attempt to initiate such debate by asking whether the national courts should keep an eye on the development of non-binding law and take soft law into account when resolving cases. But why ask this question that was answered nearly thirty years ago in *Grimaldi*? The answer lies in the question. The decision in *Grimaldi* was given at a time when the EU regulatory framework was drastically different from what it is now, and the use of soft law as a mechanism of EU governance was very much in its infancy. In order to find out if the ECJ has used *Grimaldi* again and, in so doing, whether it has modified its scope of application, a longitudinal analysis of the relevant jurisprudence is carried out. The analysis reveals that since the 1989 *Grimaldi* ruling, the ECJ has referred to *Grimaldi* only seven times, most recently in 2014 in ‘*Baltlanta*’ *UAB*. All of these judgments are preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union (TFEU). However, the ECJ’s judgment does not formally decide the issue, and it is the referring national court that ultimately settles the individual dispute and also decides whether it takes soft law into account. For this reason, this Article traces those seven preliminary rulings back to the national settings to determine whether and, if so, how, the national court has operationalised the *Grimaldi* guidance in delivering the final domestic ruling.

Besides the simple passage of time, there is another reason to revisit the *Grimaldi* guidance. Recent judgments by the ECJ throw into question whether the *Grimaldi* doctrine is still relevant to national courts in their decision-making. This issue is raised in particular by two judgments: *Chemische Fabrik Kreussler* and *Koninklijke*, delivered respectively in 2012 and 2016.⁵ In the former, otherwise run-off-the-mill case, the ECJ analysed the Commission guidelines as if the question was novel and concluded that national courts “may take” soft law into account when interpreting EU law. Although the judgment departs from *Grimaldi*, it does not justify the departure – indeed, it does not even cite it. Besides softening the expression of obligation, the Court took an unexpected step by considering the guidelines themselves. In *Koninklijke*, the ECJ had to resolve the incompatibility between EU soft law and national legislation, and the resulting disagreement between the Dutch regulatory agency on the one hand, and the national court on the other. Here the ECJ stretched the *Grimaldi* guidance to the other limit, arguing that the national court may depart from the interpretation offered in the soft law measure only where it is factually justified and supported by a detailed examination of Member State market conditions. I will

⁵ Case C-308/11, *Chemische Fabrik Kreussler & Co GmbH v Sunstar Deutschland GmbH*, EU:C:2012:548, Case C-28/15, *Koninklijke KPN and Others v Autoriteit Consument en Markt (ACM)*, EU:C:2016:692.

explore and analyse both cases to determine what is left of *Grimaldi*, in particular whether they are intended to develop or complement it, or rather act as outright replacement of the doctrine.

Although the starting point of the analysis seems perhaps unnecessarily narrow, focusing on *Grimaldi* and the subsequent rulings that cite it, the close analysis of the *Grimaldi* case law is important for at least three reasons. First, the systematic examination of the case law widens into a more general discussion of soft law acts in the Member State courts and helps to gain insights into problems that national judiciaries might encounter in relation to EU soft law.⁶ Has the extensive amount of soft law eased adjudication of EU law in national courts, or has it led to new problems? Second, we need clarity on the scope and contemporary relevance of *Grimaldi* to ensure that EU law is duly applied in Member States. For better or worse, soft law constitutes a part of the EU legal order, and uncertainty about the national effects of soft law ultimately endangers the principles of legal certainty, legality, and effective judicial protection. Third, and taking into account the fact that the *Grimaldi* jurisprudence consists of preliminary rulings, the case law analysis is particularly relevant given the importance of the preliminary ruling mechanism for private applicants. The mechanism offered in Article 267 TFEU is the only way through which national economic and private actors can challenge a soft law instrument. As non-binding documents are excluded from actions for annulment under Article 263 TFEU,⁷ they are only challengeable indirectly through the preliminary reference procedure, assuming the parties can convince the judge to refer the case to the ECJ.

The outline of the Article is as follows. Section II briefly introduces the *Grimaldi* ruling and explains how the judgment has been understood in legal scholarship. Section III offers a longitudinal overview of the preliminary rulings concerning soft law acts. The analysis is not

⁶ There is literature discussing soft law in Article 265 TFEU proceedings but infringement proceedings do not involve national courts (except in rare *Köbler* situations), and thus do not shed light on the difficulties associated with the use of soft law in domestic settings. Note also that the present contribution is not concerned with the implications of EU soft law for national regulatory authorities. However, a version of the *Grimaldi* duty, fortified by the principle of sincere cooperation in Article 4(3) TEU, is generally considered to apply to Member State authorities. In other words, while soft law instruments are not binding on domestic authorities, they are to be taken into account. For the latest formulation, see Opinion of AG Wahl in Case C-526/14, *Kotnik and Others*, EU:C:2016:102, point 39.

⁷ Article 263 TFEU expressly precludes review of recommendations and opinions. However, the EU court has preferred substance over form and has occasionally found that a non-binding measure adopted by the institution is intended to produce legal effects and is hence reviewable. A far greater problem is the courts' case law regarding the standing conditions for private applicants in direct actions for annulment of EU acts.

intended to cover all the cases where the ECJ has dealt with soft law instruments.⁸ Rather, by focusing on those rulings where an explicit reference is made to *Grimaldi*, it attempts to answer the question – in keeping with the focus of this Special Issue – whether there is a common pattern in the preliminary ruling procedure, and what such a pattern looks like. As the *Grimaldi* decision itself prescribes very little as to how the judgment should be implemented, Section IV attempts to establish whether national courts apply the guidance offered by the ECJ when they deliver their final judgments. Section V asks what the national court should do with soft law instruments after *Chemische Fabrik Kreussler* and *Koninklijke*, the proverbial question being: to take or not to take soft law into account? Finally, Section VI draws conclusions and explores possible future directions of the Court’s case law in situations involving EU soft law in national settings.

As far as national courts are concerned, the analysis shows that, regardless of the status given to soft law in their domestic legal orders, Member State judges are obliged to refer to soft law when they adjudicate on cases falling within the scope of application of EU law. However, the careful analysis of relevant case law also shows that, over time, the obligation has become heavily nuanced, and can serve as much to circumscribe as to galvanise national judges in their application of EU law in domestic cases. In other words, a “soft” soft law doctrine.

II It all started with *Grimaldi*...

Mr Grimaldi was a migrant worker of Italian origin who suffered from an occupational disease caused by mechanical vibrations from the use of a pneumatic drill. The Belgian Fonds des maladies professionnelles refused to compensate the illness affecting his hands on the grounds that the illness was not recognised by the Belgian schedule of occupational diseases. The illness was, however, included in the European schedule of occupational diseases, annexed to a 1962 Commission Recommendation. The recommendation was given to encourage the Member States to introduce the schedule as part of national social legislation. This and another Commission recommendation, issued four years later in 1966 on the conditions for granting compensation to persons suffering from occupational diseases, were based on ex Article 155 of the EEC Treaty (ex

⁸ As the ECJ does not use the term “soft law”, the systematic analysis is only possible by searching the Curia database using certain policy instruments such as “recommendation” or “guidelines” or particular rulings like *Grimaldi*.

Article 211 EC), which conferred on the Commission a general power to “formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary”.

The Belgian Labour Court submitted the reference to the ECJ inquiring whether the European schedule of occupational diseases has a direct effect, allowing Mr Grimaldi to rely on the recommendation. AG Mischo based his analysis on the comparison of the normative effects of recommendations on the one hand and regulations and directives on the other: recommendations, unlike the other two instruments, do not have binding force. Since binding force is necessary for a legal instrument to have a direct effect, recommendations cannot be relied upon to claim or enforce rights.⁹ Although the referring court in no way questioned the authority of the ECJ to rule on the interpretation or validity of the recommendation, AG Mischo perceived it necessary to complement his opinion by observing that the Court has jurisdiction to adjudicate the matter before it.¹⁰

In the judgment, the ECJ first endorsed the question about its jurisdictional reach. The ECJ considered it to be within its powers to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception, including non-binding instruments like recommendations and opinions.¹¹ As regards the second question, i.e. whether recommendations can produce binding effects, the Court, like AG Mischo, concluded that recommendations cannot give rise to rights upon which individuals may rely in court.¹² With both concurring on the limited right-generating capacity of recommendations, the real surprise was that, unlike AG Mischo, the ECJ did not stop after having confirmed that recommendations do not create enforceable rights. Wishing to “give a comprehensive reply to the question asked by the national court”, the Court went further by acknowledging the capability of recommendations to create legal effects. The ECJ called attention to the fact that recommendations are not to be regarded as having no legal effects, and the national courts are bound to take non-binding measures into consideration, especially “where they cast light on the interpretation of national measures

⁹ Opinion of AG Mischo in Case C-322/88, *Grimaldi*, EU:C:1989:366, point 4.

¹⁰ *Ibid.*, point 12 and et seq. He referred to the judgments in Case 113/75, *Frecassetti v Amministrazione delle finanze dello Stato*, EU:C:1976:89 and Case 90/76, *Van Ameyde v UCI*, EU:C:1977:101.

¹¹ Case C-322/88, para. 8.

¹² *Ibid.*, para. 16.

adopted in order to implement them or where they are designed to supplement binding Community provisions”.¹³

In standard text books on EU law, *Grimaldi* is usually brought up to affirm the jurisdiction of the ECJ to give preliminary rulings concerning the interpretation or validity of all acts of the institutions or, vice versa, the national court’s mirror-image right to make a reference to the ECJ in such situations.¹⁴ However, for scholars of soft law in particular, *Grimaldi* is a household name as the case in which the ECJ expressly acknowledged the capability of non-binding law to create legal effects.¹⁵ Compared to earlier case law, *Grimaldi* marked the hardening of the status of soft law for national courts from “voluntary” to “mandatory” interpretation aid.¹⁶ These legal effects, necessitating that courts give due regard to non-binding measures, are generally considered to only apply to national courts, although no compelling reason has to date emerged to explain why the same obligation would not apply to all courts, both EU and national.¹⁷ As shown below, the difference in treatment between EU and national courts is insignificant in practice, as the EU courts also take soft law into account.¹⁸

What kind of obligation does *Grimaldi* impose on national courts? Some argue that it involves a duty of consistent interpretation (obligation of result), obliging a national court to interpret national legislation in light of soft law instruments adopted by the institutions.¹⁹ For others, a broad reading of this kind would contradict the principle of legal protection by allowing soft law to impose rights and duties “through the backdoor”, and, hence a more restrictive interpretation of

¹³ Ibid., para. 18. The French expression is “sont tenus de prendre les recommandation en considération...”.

¹⁴ Among others, see Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (6th edn, OUP, 2015) 109; Catherine Barnard and Steven Peers, *European Union Law* (OUP, 2014), 286.

¹⁵ As these effects come in play indirectly, by way of influencing the court’s reasoning, these effects are sometimes referred to as “indirect legal effects”. See Senden 2004, 240 and 267.

¹⁶ See *ibid.*, 402–407.

¹⁷ *Ibid.*, 399. See also Stefan 2013, 164.

¹⁸ In some policy areas more than others. In cases concerning customs tariffs, the Court has used the explanatory notes drawn up by the Commission. Typically, the Court points out that they may be an important aid to the interpretation of tariff headings but do not have legally binding force. However, the Court uses these notes to guide its interpretation. See Case C-666/13, *Rohm Semiconductor GmbH v Hauptzollamt Krefeld*, EU:C:2014:2388, para. 25 and paras 47 and 48 or Case C-297/13, *Data I/O*, EU:C:2014:331, para. 50. Two factors explain why the Court is open to taking the explanatory notes into account. First, much importance is attached to the uniform application of the Common Customs Tariff, and the explanatory notes are an important means of ensuring this uniformity. Second, the notes are published in the Official Journal of the European Union.

¹⁹ Anthony Arnall, “The Legal Status of Recommendations”, 15 *European Law Review* (1990), 318. The judgement on the basis of which Arnall makes the argument is Case C-14/83, *Von Colson*, EU:C:1984:153. The question on the meaning of a duty to take soft law into account is part of a larger dilemma of what national law’s (and courts’) compliance with EU law requires. For the discussion, see Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing, 2015), 238–239.

Grimaldi should be preferred.²⁰ This narrower understanding of the *Grimaldi* guidance consists of the “duty of effort”, that is, an effort on the part of national courts to take recommendations into account “when they can actually contribute to the establishment of the meaning and scope of hard Community law”.²¹ In this latter case, while formalising the role of soft law in the interpretation of the law, *Grimaldi* would leave it up to the national courts to decide whether or not to use soft law. The disagreement arises at least partially from difficulties to pin down the specific meaning of the expression “take into account”. According to dictionary definitions, the expression can mean “including” something when making a decision or judgment or “thinking” about something when making a decision or judgment,²² the former corresponding to the obligation of result and the latter to the obligation of effort. The choice of one cannot, however, be taken out of context, and the meaning of “take into account” can only be determined through analysis of the Court’s use of the phrase.

Does the policy area matter in the interpretation of the *Grimaldi* guidance? The impact of a particular policy area on the strictness of the obligation is a question on which there is limited information, and, what little there is, comes from competition policy. Following the decentralisation of competition law enforcement, which placed national courts on an equal footing with the EU courts in the application of EU competition law, the argument has, however, been made that the stricter interpretation of *Grimaldi* serves to ensure the consistency of application of EU competition law.²³ Also in the context of competition policy, Lehmkuhl goes as far as suggesting that the *Grimaldi* obligation can be read as acknowledging the right of the Commission to use soft law to strengthen its position in relation to national courts.²⁴ Unlike the EU-national courts relationship that is widely discussed and researched, the relationship between the Commission and national courts, is, with the exception of competition policy, unexplored.²⁵ This

²⁰ Senden 2004, 473.

²¹ Ibid., 474.

²² <http://idioms.thefreedictionary.com/take+into+account> (last visited 5 June 2016).

²³ Stefan 2013, 165. See also Georgieva 2015.

²⁴ Dirk Lehmkuhl, “On Government, Governance and Judicial Review: The Case of European Competition Policy”, 28 *Journal of Public Policy* (2008), 151.

²⁵ Council Regulation 1/2003 establishes a procedural innovation enabling the Commission to submit written observations in national court proceedings, the innovation that Wright calls “Commission’s own preliminary reference procedure”. See Kathryn Wright, “The European Commission’s Own ‘Preliminary Reference Procedure’ in Competition Cases”, 16 *European Law Journal* (2010), 736–759.

makes it difficult to judge whether, and how widely, the Commission uses soft law as a medium to bolster itself *vis-à-vis* national courts in certain policy areas.

An additional related problem is the material scope of *Grimaldi*. The ECJ did not use the term “soft law” in deciding *Grimaldi*. In fact, a search on the Court’s Curia database makes evident that soft law does not belong to the CJEU’s vocabulary, and no single case of the use of the term could be found in the search results. Interpreted narrowly, the conclusion would then have to be that *Grimaldi* only lays down that Commission recommendations have legal effects to be considered by national courts. What is the significance of the decision for soft law instruments other than recommendations as enshrined in Article 288 TFEU? Does the *Grimaldi* guidance treat alike all soft law instruments adopted by the institutions, not just those of the Commission? What about non-binding guidance issued by EU agencies or the Commission in collaboration with industry stakeholders?²⁶

My intention is not to dwell upon these issues at the abstract level, but rather to examine the Court’s post-*Grimaldi* jurisprudence with a view to finding answers to the questions mentioned above.

III From *Grimaldi* to ‘Baltlanta’ UAB: A longitudinal view on the *Grimaldi* case law

A. EU Level

So, what happened after *Grimaldi*? Given that the *Grimaldi* judgment was handed down in 1989, nearly thirty years ago, one might be forgiven for assuming that by 2015 the *Grimaldi* decision would have been referred to by the ECJ on several occasions. However, performing a search on the Curia database shows that, in fact, the Court has referred to the *Grimaldi* judgment only seven

²⁶ AG Ruiz-Jarabo Colomer has held that there are no serious impediments to extending the *Grimaldi* case law to other forms of soft law, such as guidelines. See Opinion of AG Ruiz-Jarabo Colomer in Case C-415/07, *Lodato Gennaro & C. SpA v Istituto nazionale della previdenza sociale (INPS) and SCCI*, EU:C:2008:658. For the opposite view, see Senden 2004, 391.

times.²⁷ All the judgments are preliminary rulings, delivered between 1993 and 2014.²⁸ The nature and scope of the legal effects of soft law have also been dealt with or touched on in other judgments handed down by the ECJ, but, in order to offer a systematic analysis, this contribution is interested only in *Grimaldi* case law, namely the judgments of the ECJ that make explicit reference to *Grimaldi*.²⁹

The first judgment, given in 1993 in the case *Deutsche Shell AG*, examined the legal effects of recommendations adopted by the Joint Committee within the framework of the Convention on a Common Transit Procedure.³⁰ The Convention laid down measures for the movement of goods between the Community and the EFTA countries by introducing a common transit procedure for all goods, regardless of their kind or origin. Article 14 of the Convention established a Joint Committee entrusted with the administration and implementation of the Convention. Under Article 15 of the Convention, the Joint Committee could make recommendations and, in the cases provided for in Article 15(3), adopt decisions, which are then to be put into effect by the Contracting Parties in accordance with their own legislation.

The Joint Committee adopted “arrangements” concerning the sealing of goods applicable in trade with Switzerland and Austria. As required by the Convention, the national German authority implemented these “arrangements” by a decision, which *Deutsche Shell AG* subsequently contested in the national court. The referring court presented the ECJ with several individual but related questions, among which was the question of whether the ECJ has jurisdiction

²⁷ One explanation that may be put forward here is that, historically, precedent has not played much role in the Court’s reasoning. See Takis Tridimas, “Precedent and the Court of Justice: A Jurisprudence of Doubt?” in Julie Dickson and Pavlos Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (OUP, 2012), 307–330, 308.

²⁸ The search covered the years up until 2015. AsG are generally considered to be more soft law friendly than judges, and the *Grimaldi* decision shows up in the search results for the opinions of AsG. For instance, in the *Kalanke* case, AG Tesauro cited *Grimaldi* and noted that soft law “may, as the court has held, certainly be used as an aid for interpreting other Community provisions which it is intended to complement”. See the Opinion of AG Tesauro in Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, EU:C:1995:105, point 20. Moreover, the General Court (GC) has made reference to *Grimaldi* in a total of four cases, see Case T-346/03, *Krikorian and Others v Parliament and Others*, EU:T:2003:348; Case T-240/04, *France v Commission*, EU:T:2007:290; Case T-109/06, *Vodafone España and Vodafone Group v Commission*, EU:T:2007:384, and Case T-721/14, *Belgium v Commission*, EU:T:2015:829. However, since the focus is on the relationship between the ECJ and national courts, opinions of AsG and the judgments of the GC are not part of the present analysis.

²⁹ It is, of course, possible to argue that instead of going back to the “original” case, the Court cites more recent cases that have cited *Grimaldi*. In other words, the ECJ does not refer to *Grimaldi* but refers to, for instance, *Deutsche Shell* or *Altair Chimica*, which both cited *Grimaldi*. However, the ECJ has continued to refer to *Grimaldi* over a period of nearly 30 years, which seems to suggest that it has not systematically applied “the most recent case” formula, should it exist.

³⁰ Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*, EU:C:1993:24.

to interpret Committee recommendations, and also whether the Joint Committee has the power to recommend that certain practices be followed in Member States. Starting with the former, the Court embarked on an assessment of the legal nature of the “arrangements”. Referring to *Grimaldi*, given only a few years earlier, the ECJ maintained that neither lack of binding effect of the recommendation nor its adoption by the Joint Committee precludes the Court from ruling on its interpretation.³¹ Analogously, although individuals cannot rely on recommendations before national courts to enforce their rights, the latter are “obliged to take them into consideration especially when, as in this case, they are of relevance in interpreting the provisions of the Convention”.³² The Court also confirmed that the Joint Committee has the authority to recommend certain arrangements be adopted at national level.³³

Almost ten years passed before the second ruling containing a reference to *Grimaldi* appeared. In *Altair Chimica*,³⁴ the issue in the proceedings between Chimica and ENEL concerned the interpretation of several pieces of legislative and soft law norms. The Florence court of appeal asked whether Articles 81, 82 and 85 EC (now Articles 101, 102 and 105 TFEU), Directive 92/12 or Council Recommendation 81/924 on electricity tariff structures must be interpreted as to preclude a measure providing for the levy of surcharges on the price of electricity. After finding that primary and secondary legislation did not preclude a Member State from imposing surcharges on electricity, the Court examined the recommendation more closely. Repeating the *Grimaldi* formula in full,³⁵ the ECJ found that the recommendation is inapplicable to the current proceedings because it only regulates the structure of tariff, not the price. Thus, in the Court’s understanding, “Recommendation 81/924 does not prevent a Member State from levying surcharges such as those at issue in the main proceedings”.³⁶

In the third case, *Friesland Coberco Dairy Foods BV*, the Court adjudicated on the legal effects of conclusions of the Customs Code Committee and its own jurisdiction to rule on the

³¹ Ibid., para. 18.

³² Ibid.

³³ Ibid., para. 23.

³⁴ Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA*, EU:C:2003:451. In later cases, *Altair Chimica* was often referred together with *Grimaldi* (e.g. in *Arcor*, *Rosalba Alassini* or ‘*Baltlanta*’ *UAB*).

³⁵ Case C-207/01, para. 41.

³⁶ Ibid., para. 43. Note that AG Jacobs argued, on the basis of *Grimaldi*, that the effects of soft law were “somewhat limited”, as soft law instruments had only to be taken into account by the Courts and could only cast light on hard law provisions. Therefore, the recommendation could not invalidate the conclusions previously reached on the basis of the Treaty provisions and the Directive. See Opinion of AG Jacobs in Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA*, EU:C:2003:151, point 57.

validity of those conclusions in the context of the preliminary reference procedure.³⁷ The EU customs legislation is harmonised in the Customs Code established by Council Regulation (EEC) 2913/92. To ensure the correct application of EU customs measures, implementing powers are conferred on the Commission, assisted by the Customs Code Committee. Referring to *Grimaldi*, the ECJ once again confirmed that its jurisdiction extends to all acts of the institutions without exceptions.³⁸ However, as the Committee's conclusions could not "be imputed to the Commission", that is, they were not acts of the EU institution, the Court found them to fall outside its jurisdiction.³⁹

With regard to the legal effects of the Committee's conclusions, the ECJ insisted that they are not binding on national customs authorities. To support its conclusion, the Court remarked that the Committee was established to ensure close and effective cooperation between Member States and the Commission, and, thus, the Committee's role consists of "assisting the competent national authorities to take decision, not in imposing constraints on them".⁴⁰ In other words, while Member State customs officials must give the conclusion due regard, they cannot be relied upon to determine the limits of a final decision of the authority. A degree of binding force is, however, implied by reason of the fact that the authorities must give reasons should they depart from the Committee's conclusion.⁴¹ The case is exceptional because the Court *de facto* ruled on the substance of the case without actually having the formal authority to interpret the measures in question.

A few years later, the Court delivered its fourth *Grimaldi* judgment in *Arcor*.⁴² By a series of questions, the national court asked the ECJ to interpret several provisions of Regulation 2887/2000, in particular those regulating access of network operators to the local loop. In interpreting the Regulation, the Court used not one but three Commission Recommendations to aid its own interpretation.⁴³ The decision in *Arcor* marks the first time, in the context of the

³⁷ Case C-11/05, *Friesland Coberco Dairy Foods BV v Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen*, EU:C:2006:312.

³⁸ *Ibid.*, para. 36.

³⁹ *Ibid.*, para. 37. The ruling contradicts the decision in *Deutsche Shell* in which the fact that recommendations were not adopted by the institutions did not preclude the Court from ruling on the case. For the Court they nonetheless constituted "a measure of Community law". See Case C-188/91, para. 18.

⁴⁰ Case C-11/05, para. 30. In this respect, the Court also relied on the case law concerning the opinions of the Committee on Common Customs Tariff Nomenclature. Although these opinions constitute an important means of ensuring the uniform application by national customs authorities of the Customs Code and as such they may be considered as a valid aid to the interpretation of the Code, they do not have legally binding force, see *ibid.*, para. 39.

⁴¹ Case C-11/05, para. 27.

⁴² Case C-55/06, *Arcor AG & Co. KG v Germany*, EU:C:2008:244.

⁴³ *Ibid.*, e.g. paras 63, 82, 83 and 130.

Grimaldi jurisprudence, that the Court itself resorted to soft law.

In one such instance, the Court argued that “it is necessary to rely on Recommendation 2000/417 which, as opposed to the other recommendations ... concerns specifically unbundled access to the local loop and *also refers to Directives 97/33 and 98/10*”.⁴⁴ The Court emphasised two issues: first, the Commission Recommendation specifically regulated the disputed matter, and, second, it referred to the underlying legislative framework. The ECJ further remarked that the approach endorsed by the Recommendation “will foster fair and sustainable competition and provide alternative investment incentives”.⁴⁵ However, it admitted that other alternative approaches cannot be ruled out, and the national regulatory authority (NRA) is in a position to make a decision that reflects each individual competitive situation.⁴⁶

VB Pénzügyi Lízing, the fifth relevant judgment, concerns the interpretation of Council Directive 93/13/EEC on unfair terms in consumer contracts.⁴⁷ The referring court inquired about the provisions which may be the subject of a preliminary ruling, in particular the jurisdiction of the ECJ to interpret the concept of “unfair term” appearing in the Directive and its annex. In its response to the national court, the ECJ invoked *Grimaldi* to establish its jurisdiction.⁴⁸ The case does not contain soft law acts so the reference to *Grimaldi* was only to give weight to the universal jurisdiction of the ECJ.

The next judgment, the joined cases of *Rosalba Alassini*, deals with the interpretation of the principle of effective judicial protection in relation to out-of-court settlements of consumer disputes in the area of electronic communications. Under Article 34 of the Universal Service Directive, Member States must ensure that transparent, simple and inexpensive out-of-court procedures are available, enabling disputes involving consumers and relating to issues covered by that Directive to be settled fairly and promptly.⁴⁹ The applicable regulatory framework consisted, in addition to the Directive, of two Recommendations 98/257/EC and 2001/310/EC which set out

⁴⁴ Ibid., para. 94 (emphasis added).

⁴⁵ Ibid.

⁴⁶ See similarly in the area of competition law where Commission guidelines have the purpose of guiding the courts and competition authorities of the Member States when they apply the provisions of EU law. However, they do not have binding effect on Member State authorities. See, e.g., Case C-360/09, *Pfleiderer*, EU:C:2011:389, para. 21 or Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, para. 31 where the Court stated that the national authority “may take [guidelines] into account ... but is not required to do so”.

⁴⁷ Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, EU:C:2010:659.

⁴⁸ Ibid., para. 38.

⁴⁹ See Directive 2002/22/EC on Universal Service and users’ rights relating to electronic communications networks and services (OJ 2002 L 108, p. 51).

the principles applicable to out-of-court settlement of consumer disputes. The Italian legislation required that parties must attempt to achieve an out-of-court settlement before they can refer their case to court.⁵⁰ The referring court wished to ascertain whether such national legislation is precluded on the basis of the Directive and with reference to the principle of effective judicial protection. The Court held that, when making available those out-of-court procedures at the national level, the Member States must take due account of Recommendation 98/257, as stated in the preamble of the Directive. In this respect, the Court, however, stressed that neither the Directive nor the Recommendation were precise enough to guide the Member States in establishing relevant procedures.⁵¹

The seventh and most recent *Grimaldi* case is from 2014. The decision in ‘*Baltlanta*’ *UAB* concerned the company’s application for damages for material and non-material loss suffered by it as a result of being prevented from obtaining financial assistance from the Union structural funds. The referring Lithuanian court asked how Article 38(1)(e) of Regulation 1260/1999, Article 19 of Regulation 2792/1999, and Sections 6 and 7 of the Commission guidelines must be interpreted in this context.⁵² As regards the guidelines, the Court argued, after reiterating the *Grimaldi* doctrine, that the Commission guidelines must be interpreted in accordance with the binding EU law provisions they supplement, in this case Regulation 1260/1999.⁵³ This is a highly interesting statement because the ECJ usually examines the exact opposite question: that is, soft law’s role in the interpretation of the law. The Court found that neither the guidelines nor the two Regulations could be relied on by the applicant, as they had no relevance for the questions under consideration.⁵⁴

B. National level

The judicial narrative – of Italian consumer legislation or Mr Grimaldi’s ailments – does not end with the delivery of the judgment by the ECJ, this being only “the story so far”. It is up to the

⁵⁰ Joined Cases C-317/08 to C-320/08, *Rosalba Alassini and Others v Telecom Italia SpA and Others*, EU:C:2010:146.

⁵¹ C-371/08, para. 41. As part of litigation, the Court also referred to the principle of effective judicial protection of Article 47 of the EU Charter of Fundamental Rights. Norbert Reich, for instance, interprets this as “‘upgrading’ ‘non-binding’ recommendations beyond Article 288(5) TFEU”. See Norbert Reich, “‘Reflexive Contract Governance in the EU’ – David Trubek’s Contribution to a More Focused Approach to EU Contract Legislation” in Grainne de Búrca, Claire Kilpatrick and Joanne Scott (eds.), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Bloomsbury, 2013), 281.

⁵² Case C-410/13, ‘*Baltlanta*’ *UAB v Lietuvos valstybė*, EU:C:2014:2134.

⁵³ *Ibid.*, para. 65.

⁵⁴ *Ibid.*, paras 66 and 67.

referring national court to resolve the matter conclusively. In order to find out how the advice offered by the ECJ, in particular the guidance concerning soft law, was applied by the courts in subsequent national proceedings, the follow-up practice of the referring court after the ECJ's judgment was examined. The search for the national final rulings was, however, met with varying degrees of success, and tracing the proceedings in the national jurisdictions proved complicated.⁵⁵

The Association of the Council of States and Supreme Administrative Jurisdictions (ACA-Europe) operates two databases (DEC.NAT and JuriFast) that include information on preliminary rulings, the reply of the ECJ, and the final decision by the national court.⁵⁶ Containing nearly 30,000 references to national decisions from 1959 up to the present day, the data in the DEC.NAT can be searched online. Of the eight cases examined above (*Grimaldi* as well as the seven cases mentioning *Grimaldi*), the DEC.NAT only contains a final judgment in *Grimaldi*.⁵⁷ In its judgment given on 6 September 1990, the Belgian Labour Court relied on the European list of occupational diseases adopted as a recommendation to qualify the ailment affecting Mr Grimaldi's shoulders and hands as an occupational disease. Since the disability percentage rates in respect of shoulders had previously been established, it ordered the Fonds des maladies professionnelles to compensate Mr Grimaldi and ordered further expert investigation to establish the disability percentage rates in respect of hands. In other words, the national court followed the advice given by the ECJ and compensated Mr Grimaldi on the basis of the Commission recommendation. It ended well for Mr Grimaldi.

Furthermore, the DEC.NAT contains a link to the national final ruling in *Friesland*. The information provided by the website is in Dutch with no English summary.⁵⁸ The attempts to obtain

⁵⁵ This is not, as such, surprising because it is generally recognised that the delivery of the judgment by the ECJ is precisely the temporal point where the judicial narrative ends, and no one seems to know whether national courts subsequently follow the ECJ. See Michal Bobek, "Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts" in Maurice Adams et al (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart Publishing, 2013). In one study, it was found that ECJ rulings are implemented in 96.3 per cent of the cases studied. See Stacy A Nyikos, "The Preliminary Reference Process. National Court Implementation, Changing Opportunity Structures and Litigant Desistment", 4 *European Union Politics* (2003), 379–419.

⁵⁶ www.aca-europe.eu/index.php/en/dec-nat-en (last visited 9 June 2018). The information in the DEC.NAT database is collected by the ECJ and transmitted to ACA-Europe. ACA-Europe has also developed another database, JuriFast. The information is entered into it directly by the members of ACA-Europe. Coordinating this work, ACA-Europe offers translations of descriptions and summaries. It contains just over 2 000 decisions.

⁵⁷ The database contains basic information on *Altair Chimica*, *Rosalba Alassini* and *NB Pénzüguyi Lizing* but the national judgment is missing.

⁵⁸ Link to the judgment: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BH0606&keyword=C-11%2f05&keyword=c-11%2f05> (last visited 9 June 2018).

copies of the other six final judgments through directly addressing the respective national judiciaries were not successful.⁵⁹ In one case, the request for a copy of a national ruling was denied for procedural reasons. The Hungarian court refused to disclose the national final ruling in *VB Pénzügyi Lízing* on the grounds that Paragraph 119. § (1) of the Code of Civil Procedure does not permit third parties to receive a copy of the final judgment.⁶⁰ The remaining national judiciaries did not respond, and the repeated emails went unanswered.

With regard to clarifying the scope of domestic application of *Grimaldi*, the attempts to retrieve the final judgments by the national court unfortunately amounted to very little. A good guess is that the national court accepts the guidance offered to it by the ECJ and acts accordingly. In the situations in which the ECJ comes to the conclusion that soft law is not applicable, since the question(s) referred fall outside the material scope of application of, usually, the recommendation (*Altair Chimica*, ‘*UAB*’ *Baltlanta*), or because soft law rules are too imprecise to be useful (*Rosalba Alassini*), it is unlikely that the national court would concern itself with non-binding guidance when it gives the decision. By contrast, the ECJ’s conclusion to use the recommendation to guide its own interpretation (*Arcor*) will inevitably have a similar effect at the national level.

IV Is there a common pattern emerging?

Those seven judgments referencing *Grimaldi* can be categorised into two main groups: those dealing with jurisdiction and those with applicability, i.e., whether soft law acts can be relied on by the court in situations of interpretative ambiguity. The first group comprises *Deutsche Shell*, *Friesland Coberco Dairy Foods*, and *NB Pénzügyi*. In these three cases, the ECJ used *Grimaldi* to universally confirm the principle that it has jurisdiction with regard to soft law. However, the concrete application of the principle was different in the cases. In *Deutsche Shell* and *NB Pénzügyi*, the Court established that it has jurisdiction. In *Friesland Coberco Dairy Foods*, the Court instead held that the conclusions of the Customs Code Committee were not the acts of the institutions, and, hence, they could not be examined in the preliminary reference procedure. The difference between *Deutsche Shell* and *Friesland Coberco Dairy Foods* is susceptible to criticism on the ground that the Recommendations of the Joint Committee in *Deutsche Shell* cannot be

⁵⁹ The requests for copies of the national final judgments were sent in spring 2016 by Daniel Wyatt.

⁶⁰ Personal communication, dated 3 March 2016 (on file with author).

regarded as an institutional act, a consideration which the ECJ appeared to ignore at the time. Generally speaking, however, the Court has consistently ruled that it has jurisdiction to review instruments and measures irrespective of whether or not they have binding force.⁶¹

The second group consists of the four cases where the issue was the significance of soft law instruments in the interpretation of the law. The formal legal nature of the measure did not figure prominently in the Court's analysis in any of these cases. In two of the cases (*Altair Chimica* and '*Baltlanta*' UAB), the ECJ rejected the use of non-binding guidance, not because of the lack of binding force, but, rather, because the instrument was of no assistance to the interpretation of the law. The issue of binding effect was not taken up in *Rosalba Alassini* and *Arcor* either. While in the former the ECJ ruled, in accordance with the preamble to the relevant Directive, that national authorities must take due account of the Commission recommendation, in the latter the Court used the Commission recommendation to guide its own interpretation.

Table 1. Scope and effects of the *Grimaldi* jurisprudence.

Case	Policy area	Policy instrument	Obligation of MS court	CJEU	Scope of duty	Primary act/legal instrument
<i>Grimaldi</i>	Social policy	COM rec	Bound	Jurisdiction	n/a	Treaty (1)
<i>Deutsche Shell AG</i>	Customs	Joint Committee rec	Obligated	Jurisdiction	Obligated to consider (NRA)	Convention (2)
<i>Altair Chimica</i>	Energy policy	Council rec	Bound – outside of scope	n/a	n/a	Treaty (3)
<i>Friesland Coberco</i>	Customs	Committee conclusion	Not bound	No jurisdiction	Not bound	Implement. Reg. (4)
<i>Arcor</i>	Telecommunications	COM rec	Bound	Uses itself	Bound but	Treaty (5)

⁶¹ See also AG Wahl in Case C-526/14, *Kotnik and Others*, EU:C:2016:102, points 23–25.

					flexible (NRA)	
<i>VB Pénzügyi Lízing</i>	Consumer policy	n/a	n/a	Jurisdiction	n/a	n/a
<i>Rosalba Alassini</i>	Consumer policy	COM rec	Bound – too imprecise	n/a	MS to follow	Dir. (6)
<i>Baltlanta UAB</i>	Structural funds	COM guidelines	Bound – outside of scope	n/a	n/a	Treaty (7)
<i>Chemische Fabrik Kreussler</i>	Goods	COM guidelines	May take into account	Uses itself	n/a	No
<i>Koninklijke</i>	Telecommunications	COM guidelines	May depart only where	n/a	Shall inform if does not follow	Dir. (8)

(1) Ex Article 211(2) EC. Post-Lisbon provision is Article 17 TEU.

(2) Article 15 of the Convention on a Common Transit Procedure. OJ 1987 L 226.

(3) Ex Article 235 EC.

(4) Article 504 of the Commission Regulation (EEC) 2454/93.

(5) Ex Article 211 EC (17 TEU). See also Recital 13 of the Regulation 2887/2000 that endorsed the prior guidance given in the form of Commission recommendation.

(6) Ex Article 211 EC (17 TEU). See also Recital 47 of the Universal Service Directive 2002/22/EC: “Member States should take full account of Commission Recommendation 98/257/EC...”.

(7) Article 88 EC (108 TFEU).

(8) Article 19 of Directive 2002/21/EC.

Apart from the subject matter, is it possible to deduce a common pattern from the *Grimaldi* case law? As Table 1 shows, the *Grimaldi* jurisprudence is spread across different policy domains. Combining this with the small number of the cases renders it difficult to establish a clear correlation between the policy area and the other variables. What about the form of the soft law instrument in question? The original soft law instrument was the Commission recommendation but, as demonstrated by the column “Policy instrument” in Table 1, the ECJ has extended the

Grimaldi guidance to “Joint Committee Recommendation”, to “Council Recommendation”, and perhaps most interestingly, “Commission guidelines” in ‘*Baltlanta*’ UAB. In this respect, the case law seems to offer some support to the argument, put forward by AsG and academics, that *Grimaldi* can be applied to instruments other than those enshrined in Article 288 TFEU. With the exception of *Deutsche Shell*, the Court’s *Grimaldi* jurisprudence only covers soft law documents issued by the institutions.

The ECJ has systematically paraphrased the *Grimaldi* obligation as it relates to national courts (see the middle column in Table 1). Apart from *Deutsche Shell*, where the Court used the word “obliged”, it has, in all other cases, reiterated the expression “bound to take into account” from *Grimaldi*.⁶² The jurisprudence does not provide any further clarification as to the actual scope of the guidance. In some judgments the Court also provided guidance to the national regulatory authority, as shown in the column “Scope of duty”. A representative example is *Arcor* in which the ECJ diligently, provision by provision, set out the content of the Recommendation before concluding that a different interpretation, not the one put forward by the Recommendation, is possible, and that “the NRA is in a position to take account of each individual competitive situation”.⁶³

Can the ECJ then only bind national judiciaries to *Grimaldi* where the adoption of soft law meets some kind of legal mandate? In all of the analysed judgments, the Court expressly referred to either the competence of the institutions to adopt non-binding rules, or that a particular piece of secondary legislation obliges Member States to fully account for such norms. I return to this interesting issue immediately below, as it relates to further developments in the *Grimaldi* jurisprudence.

V Life after *Chemische Fabrik Kreussler* and *Koninklijke*: What’s left of *Grimaldi*?

Table 1, detailing the *Grimaldi* jurisprudence, is complemented with additional information on two cases. The decision in *Chemische Fabrik Kreussler* (CFK) was given after *Rosalba Allassini* but before ‘*Baltlanta*’ UAB whereas the *Koninklijke* decision was delivered after ‘*Baltlanta*’ UAB in 2016. Both are placed in the Table 1 after the ‘*Baltlanta*’ UAB. The rationale for discussing

⁶² In all cases the French expression was identical: “sont ... tenus ... prendre en consideration”.

⁶³ Case C-55/06, para. 95.

these cases in connection with the *Grimaldi* jurisprudence is simple: the ECJ answered the *Grimaldi* question, yet neither referenced nor even mentioned *Grimaldi*.⁶⁴

The *CFK* judgment dealt with the interpretation of the Medical Directive, raised in the proceedings concerning the classification of a mouthwash solution called ‘PAROEX 0,12%’, between two German mouthwash producers, Sunstar Deutschland GmbH and Chemische Fabrik Kreussler. One of the questions asked by the referring court was whether it could rely on the Commission guidelines when defining the term “pharmacological action”. Without reference to *Grimaldi*, the ECJ noted that whilst guidelines are not legally binding or enforceable against individuals, they may nevertheless “provide useful information for the interpretation of the relevant provisions of European Union law and therefore contribute to ensuring that they are applied uniformly”.⁶⁵ For this reason, the national court “may ... take account of that document”.⁶⁶ What is striking is the manner in which the ECJ argued the case: it analysed the legal effects of soft law as if the question was novel. The *CFK* decision is short and not overly articulate, with the Court failing to explain why it chose to deploy the formulation “may take”.⁶⁷ Two initial options present themselves: either we treat *CFK* as a judicial anomaly, the significance of which is strictly restricted to the circumstances of the case, or we openly consider the possibility that the ECJ deliberately chose not to apply *Grimaldi*.

CFK was almost immediately referred to in subsequent jurisprudence, suggesting that it was not an anomaly.⁶⁸ Let us then assume, for the sake of the argument, that the ECJ departed from the precedent set by *Grimaldi*.⁶⁹ This immediately begs the question of why the Court would do such a thing. There are, in effect, several options. First, we could argue that, rather than reversing

⁶⁴ *Koninklijke* included reference to the *Arcor* decision. Note that *CFK* and *Koninklijke* are not the only cases in which the ECJ has used the *Grimaldi* formula but has not explicitly referred to it. However, I am concerned only with these two cases, as in them the national court asked the *Grimaldi* question, that is, whether it is bound to take soft law into account.

⁶⁵ Case C-308/11, para. 25.

⁶⁶ *Ibid.*, para. 26. In French: “peut ... tenir compte du dit document”.

⁶⁷ Note though that the Court has used the same formulation in Case C-360/09, para. 21 or Case C-226/11, para. 31 holding that the national authority “may take [guidelines] into account ... but is not required to do so”.

⁶⁸ The decision in *CFK* was cited in Case C-106/14, *Fédération des entreprises du commerce et de la distribution (FCD) and Fédération des magasins de bricolage et de l'aménagement de la maison (FMB) v Ministre de l'Écologie, du Développement durable et de l'Énergie*, EU:C:2015:576, para. 28: “It is true that Article 77(2) of the REACH Regulation confers on the Secretariat of the ECHA the task, inter alia, of ‘providing technical and scientific guidance and tools ... and ‘preparing explanatory information on [that regulation] for other stakeholders’. Given the legislature’s intention, a document such as the ECHA Guidance document *may be* one of the factors *to be taken into consideration* in interpreting the REACH Regulation” (emphasis added).

⁶⁹ For the precedential value of the ECJ judgements, see Tridimas 2012.

Grimaldi in the strict sense of the word, the Court used the opportunity afforded by *CFK* in order to provide clarification. According to this line of reasoning, the Court may have grown concerned about the influence of soft law on the roles played by the ECJ and Member State courts.⁷⁰ In this scenario, the ECJ perceived that, whilst the use of guidance by national courts (as instructed by *Grimaldi*) eases the workload for the overburdened ECJ, it also, at least theoretically, threatens the role of the ECJ as final arbiter and interpreter of EU law due to fewer Member State court referrals.

This alternative reading is not only textually plausible, but also strongly supported by the Court's observation in *CFK*. Namely, after concluding that the national court may take guidance into account, the ECJ continued by establishing that the national court needs to ensure that the:

[I]nterpretation thus derived was derived in a manner consistent with the criteria laid down by the case-law relating to the interpretation of European Union legal acts, including those concerning the division of jurisdiction between the national courts and the Court in the context of preliminary ruling proceedings.⁷¹

What criteria does the ECJ have in mind? With regard to the preliminary ruling proceedings, the generally held view is that application is for national courts and interpretation for EU courts.⁷² Does this apply to EU soft law guidance as well, and could the *CFK* decision be simply read to signal that the Court has the sole authority to interpret guidelines? EU soft law has grown in complexity as well as in number over the years, and it requires now, unlike at the time of *Grimaldi*, an act of interpretation from those using them, something in which the ECJ may not want the national courts to engage. If the ECJ has the exclusive authority to interpret guidance, this would inevitably mean that the ECJ itself uses guidance to settle the issue of interpretation for national courts, as it did in *CFK*. Be that as it may, it is hard to see how the new formulation “may take” would help the Court to uphold its interpretative authority beyond creating a suboptimal outcome, namely triggering more references from national courts perplexed by the new formulation in *CFK*.

Second, the argument can be put forward that the ECJ chose to employ a different formulation of expression because the case involved a different non-binding measure. Whereas the

⁷⁰ See also Emilia Korkea-aho, “Legal Interpretation of Framework Directives: A Soft Law Approach”, 40 *European Law Review* (2015), 70–88.

⁷¹ Case C-308/11, para. 26.

⁷² However, it is a generally held view that the Court frequently rules on matters of fact.

Grimaldi instrument was a Commission Recommendation, *CFK* concerned a Commission guidance document. Once again, this is less plausible after '*Baltlanta*' *UAB*, where the ECJ applied the *Grimaldi* formula to cover Commission guidelines.

Third, the different formulation in *CFK* may be attributed to the fact that the adoption of the Commission guidance document was not foreseen in the Treaties or secondary legislation.⁷³ As column "Primary act/legal instrument" in Table 1 illustrates, in all cases where the ECJ has endorsed the *Grimaldi* doctrine, the adoption of a soft law act can be traced back either to the Treaty provisions or relevant secondary law.⁷⁴ Further elaboration of this point requires that we return to *Grimaldi* to illustrate the little-appreciated fact that the ECJ had, already then, explicitly acknowledged the competence issue in relation to soft law acts. It held that recommendations are adopted where the institutions do not have the powers under the Treaties to adopt binding measures or where it is not "appropriate to adopt more mandatory rules".⁷⁵ The principle of conferral of powers and the choice of the correct legal basis do not apply to soft law acts. This does not mean, contrary to what sometimes seems to be assumed, that soft law falls outside of all manner of competence control, or that the institutions are capable of adopting soft law acts at will. On the contrary, the institutions do not have an "unlimited competence" to adopt soft law.⁷⁶ Indeed, in *Grimaldi* "the Court's statement implies that it recognises the competence of the Commission, and of other institutions, to adopt recommendations, without however indicating the foundation of this competence".⁷⁷

This is where the systematic analysis of the *Grimaldi* case law again comes into play: namely, the jurisprudence strongly points to the existence of the "lite" competence test. By this I mean that, although the competence control does not apply to soft law in the sense that a legal basis must be found in the Treaties, the "lite" test requires that soft law is based on a mandate or the support of either the Treaties or secondary law. In awareness of the limited number of cases on

⁷³ However, the Guidance Document in question was adopted in 2004 when ex Article 211(2) EC was still applicable.

⁷⁴ Among others: With regard to *Grimaldi*, the Commission had wide discretion to issue opinions and recommendations under ex Article 155 EEC (ex Article 211(2) EC). In *Deutsche Shell*, the Joint Committee was mandated by the express provision in the Convention on the Common Transit Procedure to give recommendations. In '*Baltlanta*' *UAB*, the Commission had powers under Article 88 EC to propose any appropriate measures required by the progressive development or by the functioning of the common market.

⁷⁵ Case C-322/88, para. 13.

⁷⁶ See Linda Senden and A. Van den Brink, *Checks and Balances of Soft EU Rule-Making*. Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462 (2012), 21.

⁷⁷ Senden 2004, 297.

the basis of which I operate here, the longitudinal analysis of the *Grimaldi* case law (the right column in Table 1) appears to suggest a pattern. That is that the ECJ has endorsed the legal effects of soft law for national courts where either primary or secondary law confers on the institutions, usually the Commission as the prime source of EU soft law, the task of providing further guidance, or where soft law guidance is in other ways foreseen in the underlying legislation.

The case where the ECJ ‘maxed out’ *Grimaldi* is an exceptional yet instructive example of this pattern. In *Koninklijke*, the situation between the parties was highly sensitive. The Dutch court had twice annulled the decision of the national regulatory authority on the grounds that the authority had applied the Commission Recommendation, which contravened the national rules. The ECJ, clearly recognising the danger in asserting that EU soft law rules have primacy over national rules, began by underlining how the national court, as a reviewing court, must have “the appropriate expertise to enable it to carry out its functions effectively”.⁷⁸ Citing the *Grimaldi* doctrine (yet referencing only the decision in *Arcor*), the Court held that while Commission recommendations do not bind the national courts, they are bound to take them into consideration for the purpose of deciding disputes submitted to them. As such this adds nothing new to the *Grimaldi* jurisprudence. The ECJ could not, however, leave it here because taking the recommendation into consideration would effectively result in the disregarding of national binding law. Hence, the ECJ continued by saying that “a national court may depart from Recommendation 2009/396 *only where* ... it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question”.⁷⁹

How can the difference between *CFK* (may take account) and *Koninklijke* (may depart only where...) be explained? The decision in *Koninklijke* regarding the legal effects of the recommendation is anchored firmly in the factual circumstances of the liberalisation of the telecommunications market, to the extent that the ECJ appears to argue that national courts cannot bring back distortions of competition that the Commission Recommendation was adopted to remove. National courts can set the recommendation aside and refuse to apply EU soft law only if they are capable of justifying the departure. Justification must be provided not only in terms of

⁷⁸ Case C-28/15, para. 39.

⁷⁹ Ibid., para. 40. See also Opinion of AG Mengozzi in Case C-28/15, *Koninklijke KPN and Others v Autoriteit Consument en Markt (ACM)*, EU:C:2016:310, point 78.

legal arguments but, perhaps even more importantly, in terms of factual conditions that support the conclusion that national law should prevail over commonly agreed EU soft law rules.⁸⁰ Leaving issue-area related aspects aside, *CFK* and *Koninklijke* are, nevertheless, in line with the analysis undertaken above, which suggests that the ECJ has endorsed the power of soft law to guide Member State courts where the institutions have power, under the Treaties or relevant secondary law, to adopt non-binding measures. In *CFK*, the adoption of soft law could not be traced to a primary act or a secondary legal instrument, whereas in *Koninklijke*, the reference is to the Framework Directive. Pursuant to the Directive, the Commission is entitled to issue recommendations, and Member States are obliged to ensure that their national regulatory authorities take these into account when carrying out their tasks.⁸¹

Challenging the validity of soft law in Article 267 TFEU proceedings?

Before concluding, one further point should perhaps be made about the consequences of emphasising a “lite” competence control. Namely, the more the ECJ emphasises the fact that the task to make further rules has been conferred on the institutions by the underlying legislation, the more explicitly it also invites national courts to engage in competence control, to challenge the validity of EU soft law by questioning the competence of the Commission, and of other institutions, to adopt non-binding measures. Whilst *Grimaldi* in principle affirmed that the ECJ can give a preliminary ruling on the interpretation, as well as the validity, of non-binding instruments,⁸² subsequent case law seems to imply that the national courts cannot challenge the validity of a non-binding instrument utilising the Article 267 TFEU procedure. In *Deutsche Shell*, the national court inquired about the validity of the recommendation, but the Court ignored this question and only ruled on the interpretation of the recommendation.⁸³ Echoing the judicial evasion in response to validity challenges, the view taken in the literature is that the validity of non-binding instruments cannot be challenged in the preliminary ruling mechanism due to uncertainties as to whether the

⁸⁰ This was, in effect, also suggested by AG Kokott in Case C-266/11, *Expedia*, EU:C:2012:544, point 39.

⁸¹ Article 19 of Directive 2002/21/EC: “Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission giving the reasoning for its position”. Arguably such duty could be derived from the negative obligation contained in Article 4(3) TEU requiring Member States not to jeopardize the attainment of the objectives of EU law.

⁸² Case C-322/88, para. 8.

⁸³ Case C-188/91.

instrument constitutes an “act”. In reference to *Grimaldi*, Scott notes that the ECJ has accepted “a reference concerning the interpretation of a recommendation with a view to ascertaining its capacity to produce legal effects. But in relation to questions of validity, the requirement that the measure be intended to produce legal effects would seem to apply”.⁸⁴

In a recent judgment, the ECJ seems to have reversed its course, allowing a Member State court the ability to refer a question concerning the validity of a non-binding instrument. In *Kotnik and Others*, the Slovenian court raised the question of the validity of the Commission Banking Communication, and in this respect, also whether the Commission had acted ultra vires in issuing the Communication.⁸⁵ The Slovenian Government and the Commission, following the established line of thinking, expressed doubts about whether the validity of the Banking Communication is an admissible question, since that communication produces no legal effects directly on third parties.⁸⁶ The Court first explained that the case “concerns the compatibility, with a number of provisions of EU law, of the condition laid down by the Commission [in the Banking Communication] that there must be burden-sharing by shareholders and subordinated creditors”, before it emphatically concluded that “the validity of such a condition must be capable of being reviewed by the Court in the procedure provided for by Article 267 TFEU”.⁸⁷ It did not tie admissibility to the capability of the Banking Communication to produce legal effects, failing to even raise the question of the legal effects of the Communication. The Court therefore seems to expressly open the door to the national courts raising questions of validity of soft law as part of

⁸⁴ Joanne Scott, “In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law”, 48 *Common Market Law Review* (2011), 329–355, 346 fn 84.

⁸⁵ The ultra vires argument concerned in particular points 40 to 46 of the Banking Communication.

⁸⁶ C-526/14, para. 31. See also Opinion of AG Wahl in Case C-526/14, point 23 et seq: “At the outset, the Commission points out that the Banking Communication is not an act addressed to individuals and is not intended to create rights for individuals. On that basis, the Commission expresses doubts as to the Court’s jurisdiction to answer the questions referred. The Commission’s argument is, in my view, ill founded. The mere fact that an act is not addressed to individuals or intended to create rights for individuals does not mean that such an act falls outside the scope of the Article 267 TFEU procedure. The Commission’s argument would introduce distinctions between different acts of which there is no trace in that Treaty provision. What is key under Article 267 TFEU is, in fact, whether an answer from the Court on the interpretation or validity of the act in question is necessary to enable the national court to give judgment. In addition, as I will explain in the following, acts of ‘soft law’ (such as the Banking Communication), even if not binding for individuals, may nevertheless produce other kinds of legal effects. The Court has, accordingly, on numerous occasions answered questions referred by national courts on provisions contained in acts of ‘soft law’.”

⁸⁷ *Ibid.*, para. 33. The ECJ concluded that the validity of the Banking Communication in the light of the provisions of Directive 2012/30 cannot be called into question by Member State actions that do not comply with the Banking Communication, see *ibid.*, para. 85.

Article 267 TFEU proceedings.⁸⁸ The requirement that the measure produces or is intended to produce legal effects would not seem to apply.

The above analysis does not definitively settle the question of whether national courts can refer questions concerning the validity of non-binding measures adopted by actors other than the institutions, e.g., the joint action of the Commission and the Member States.⁸⁹ Neither it is clear whether national courts are obliged to take into account jointly prepared documents or those produced by EU agencies. The Court's approach to the authorship issue is a complicated one that can only be briefly discussed here.⁹⁰ The ECJ referenced the *CFK* decision in another judgment dealing with guidance prepared by the European Chemicals Agency, concluding that guidance "may be one of the factors to be taken into account" by the national court in deciding the case.⁹¹ This would suggest that as far as EU agency guidance is concerned, national judiciaries can, but are not obliged to, consider non-binding rules. In relation to validity challenges, it is likely that the ECJ would only accept a reference concerning the validity of a soft law instrument insofar as it is an act of the institution. The Court has, however, recently asserted that harmonised EU standards can be considered under Article 267 TFEU because, although adopted by a private body and only "endorsed" by the Commission, they are adopted with a view to implementing EU law.⁹² The extent to which this has a ripple effect on soft law jurisprudence more generally cannot yet be appraised.

VI Conclusions: A 'soft' doctrine for soft law?

This Article set out to discuss the *Grimaldi* obligation, that is, the obligation of national courts to take soft law into account when they adjudicate on EU law. The 1989 decision that initially

⁸⁸ Private applicants have occasionally challenged the competence of the institutions to adopt soft law. For example, Case T-694/14 where the applicant claimed that the Commission lacked the competence to adopt guidelines relating to the compatibility assessment of operating aid with the internal market. In GC's view, the Commission has jurisdiction to adopt guidelines concerning the exercise of its powers of assessment and given that they do not contradict Treaty rules, they bind the institution that has adopted them, see Case T-694/14, *European Renewable Energies Federation (EREF) v Commission*, EU:T:2015:915.

⁸⁹ Note though that joint authorship is not a problem as long as the formal authorship remains with the institution. It is clear from *CFK* (given its explicit acknowledgement by the ECJ) that the Commission guidelines were "drawn up by group of experts from the national authorities, the Commission's services and professional associations from industry". See Case C-308/11, para. 25.

⁹⁰ See Eliantonio's article in this Special Issue.

⁹¹ Case C-106/14, para. 28, also fn 68 above.

⁹² See Case C-613/14, *James Elliott Construction Limited v Irish Asphalt Limited*, EU:C:2016:821, para. 43.

imposed the duty on national courts was given at a time when the EU regulatory framework was drastically different from what it is now, and the use of soft law as a mechanism of EU governance was very much in its infancy. Has the ECJ developed or fine-tuned the *Grimaldi* guidance to better make sense of the wildly differing conditions where EU soft law is these days adopted and applied? Is the doctrine still strong? How have the national courts operationalised the guidance?

Contrary to what one may have assumed, only seven ECJ rulings referencing *Grimaldi* exist. Caution must be exercised, then, when searching for a common pattern. Furthermore, the ECJ has recently delivered two important judgments on the national effects of soft law without referencing the *Grimaldi* judgment. Whereas the Court in *CFK* advised that national courts “may take” soft law into account, in *Koninklijke* the ECJ ‘maxed out’ *Grimaldi*, to the extent that it is now exceedingly difficult for national courts to ignore soft law. Policy area alone fails to explain these variations in the judgments. Is it therefore time to bid farewell to *Grimaldi*?

The evidence emerging from the longitudinal study of the *Grimaldi* jurisprudence suggests that the Court has applied the *Grimaldi* obligation, that is, imposed the duty to take soft law into account, only when soft law acts have been adopted in the framework of Treaty or secondary law. This – what I have called “lite” competence control – reflects and captures, quite naturally, the world of soft lawmaking as it was at the late 1980s and the 1990s. Then it was mainly the Commission, and sometimes the Council, that issued non-binding instruments that were based on Treaty or secondary norms, conferring on the institutions a general power to adopt soft law. This was unique to the EU then – a consequence of its smaller size and less ambitious scope – and this same simplicity no longer applies to the EU as we now know it. Although no definitive numbers can be provided, as the EU does not compile statistics on soft law acts, it seems undisputed that soft lawmaking has both intensified and diversified. In other words, although the doctrine has not changed, the world around it has, de facto marginalising the *Grimaldi* doctrine by eroding the foundations on which its logic rests.

Consequently, although it is too early to bid farewell to *Grimaldi*, the obligation has become a “soft” doctrine, heavily nuanced on at least three counts. First, where soft law guidance is foreseen or embedded in the underlying legislation, the *Grimaldi* obligation applies in full. Further, jurisprudence post-*Koninklijke* suggests that in these cases, Member State courts can depart from the interpretation offered in such documents only where they can provide specific, detailed and substantively-grounded reasons as to why the soft law act does not apply. Whether

this represents a continuing trend or is merely a consequence of the particular policy area circumstances will not be known for some years. Second, if the soft law instrument is free-standing, that is, is not derived from primary or secondary law, domestic judicial actors have more leeway to decide whether or not to take it into account. The same should in principle apply when the measure in question is prepared by e.g., EU agencies.

The third noteworthy feature that emerges from the analysed jurisprudence is that Member States have become more proactive in challenging EU soft law and, insofar as it is an act of the institution, the Court is cautiously accepting the validity challenges posed by national courts. Allowing national courts' validity challenges signals that the ECJ is aware of the daunting complexity and extent of soft law regulation across different policy areas and invites national courts to engage in a candid and constructive dialogue on the nature and scope of effects of soft law. This further underlines the importance of research into domestic actors. Despite the efforts to obtain copies of final national judgments, the attempts were not successful, and it was therefore not possible to establish how the national courts have understood and interpreted *Grimaldi*. Similarly little is known about judicial attitudes towards soft law in Member States.⁹³ This is particularly unfortunate given the stronger and more proactive role that national courts are now assuming as regards EU soft law, with their raising, for instance, the question of institutional competence to adopt soft law acts.⁹⁴ Plausible research into EU (soft) law can no longer rely on the assumption that the national judiciaries recognise, use or even accept EU soft law, and research into national courts, including the systematic follow-up of the national final judgments, can no longer be deferred.⁹⁵

⁹³ For instance, do both old and new Member States understand soft law in a similar manner? What about their capacity to monitor and evaluate the conditions of the use of soft law? On the new literature on national courts, see Bruno de Witte et al (eds.), *National courts and EU law: new issues, theories and methods* (Edward Elgar Publishing, 2016).

⁹⁴ This may capture and reflect broader development whereby “national courts appear to have become more assertive and the debate is less about fundamental rights and more about democracy and national constitutional identity”. See Takis Tridimas, “The ECJ and the National Courts. Dialogue, Cooperation and Instability” in Anthony Arnall and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (OUP, 2015), 405.

⁹⁵ Many of the authors of this Special Issue (including the present author) are members of the “European Network on Soft Law Research (SoLaR)” bringing together academics from several EU Member States and from policy areas to pool knowledge on the national role and effects of soft law. SoLaR is a Jean Monnet Network co-funded by the Erasmus+ programme of the EU. More information can be found at: www.solar-network.eu.

